

1994

Nadine Gillmor, individually and as personal representative of the estate of Charles F. Gillmor v. Veigh Cummings : Reply Brief

Utah Court of Appeals

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Gerald H. Kinghorn; R.L. Knuth; Parsons, Davies, Kinghorn & Peters; attorneys for appellees.

Lowell V. Summerhays; Adamson & Summerhays; attorney for appellant.

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IN THE COURT OF APPEALS
DOCKET NO. 940490 CA
OF THE STATE OF UTAH

NADINE GILLMOR, individually
and as personal representative
of the estate of Charles F.
Gillmor

Plaintiff/Appellees and
Cross-Appellants,

-versus-

VEIGH CUMMINGS,

Defendant/Appellant and
Cross-Appellee.

Case No. 940490-CA

Priority # 15

REPLY BRIEF OF APPELLEES AND CROSS-APPELLANTS

APPEAL FROM A JUDGMENT ENTERED BY
THE THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY
HONORABLE HOMER WILKINSON, PRESIDING

Lowell V. Summerhays
Adamson & Summerhays
480 East 6400 South, # 314
Murray, Utah 84107

Attorneys for Appellant

Gerald H. Kinghorn (1825)
R. L. Knuth (3625)
Parsons, Davies, Kinghorn & Peters
185 South State Street, Suite 700
Salt Lake City, Utah 84111

Attorneys for Appellees

FILED

MAR - 8 1995

COURT OF APPEALS

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SUMMARY OF ARGUMENT

Veigh Cummings, the appellant and cross-respondent, has failed to marshall the evidence in the record which supports the District Court's decision, as he was required to do. Instead, Cummings has extracted those portions of the record favorable to him and has re-argued that same evidence on appeal, while asserting his own credibility and giving himself the benefit of every inference from the evidence he has chosen. Since Cummings has failed to marshall the evidence in either his principal brief or his reply brief, the Court of Appeals should consider the factual findings of the District Court to be correct and should simply review for correctness the legal conclusions of the trial court.

As a matter of law, the district court was correct in concluding that malice was implied from Cummings' conduct; that the Gillmors are entitled to damages in the form of attorneys' fees for slander of their title; that Cummings is not entitled to a set-off for amounts paid by other defendants in settlement; and, that Cummings' claims of adverse possession and slander of title were properly dismissed.

Cummings has failed to show, from evidence in the record, support for the trial court's determination to award the Gillmors only half of their attorneys' fees as damages consequent to Cummings' slander of their title.

ARGUMENT

POINT I

CUMMINGS HAS FAILED TO PROPERLY MARSHALL THE EVIDENCE.

In his reply brief, Cummings repeatedly asserts that he has marshalled the evidence and that the evidence shows the trial court's decision was clearly erroneous. It is plain that Cummings fundamentally misconstrues the nature of the marshalling requirement.

In Utah, a party challenging the trial court's findings of fact "faces a substantial appellate burden." West Valley City v. Majestic Investment Co., 818 P.2d 1311, 1313 (Utah Ct. App. 1991). As the trier of fact, the district court's findings are reviewed under a "clearly erroneous" standard, Alta Ind., Ltd. v. Hurst, 846 P.2d 1282, 1286 (Utah 1993), and a finding is only "clearly erroneous" if it is against the great weight of the evidence or if the reviewing court is "definitely and firmly convinced that a mistake has been made." Bountiful v. Riley, 784 P.2d 1174, 1175 (Utah 1989).

To make such a showing, an appellant is first required to marshall the evidence, that is, to "present in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." West Valley City, 818 P.2d at 1315. Once all the evidence supporting the decision of the trial court has been so marshalled, the appellant must "demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence' thus making them 'clearly erroneous.'" In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989),

quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987). Where the appellant has not adequately marshalled the evidence, the trial court's findings will be presumed to be correct and its decision will be affirmed. See, e.g., Grahn v. Gregory, 800 P.2d 320, 327 (Utah Ct. App. 1990), cert. denied, 843 P.2d 516 (1991).

In this case, instead of concisely stating the marshalled evidence, Cummings merely quotes large blocks of transcribed testimony. Further, in both his brief-in-chief and his reply brief, Cummings has simply lifted from the record those isolated bits and pieces of the evidence supporting his position. These, he presents with the positive inferences and superior credibility which he presents to himself -- which the District Court chose not to afford him -- and re-argues to this Court the same case he lost below.

This is precisely what the appellant attempted to do in Commercial Union Assoc. v. Clayton, 863 P.2d 29, 36 (Utah Ct. App. 1993), where this Court observed: "This tactic ignores the burden that [appellant] must carry to properly challenge the trial court's findings of fact." As it did in Commercial Union, this Court should assume that all of the trial court's factual findings are supported by the record and consider the issues Cummings raises as questions of law alone. Id. at 36, f.n. 5.

POINT II

APPELLANT HAS FAILED TO SHOW CLEAR ERROR.

The one-sided "marshalling" of the evidence Cummings presents in his briefs ignores the burden an appellant bears, as discussed in Point I above. Cummings persists in re-

arguing the evidence he presented below, insisting that the trial court should have found different facts than it did. Such an offering on appeal is insufficient.

For example, as regards the Gillmors' slander of title claim, a key element of the Gillmors' cause of action is malice. In his briefs, Cummings holds forth his own testimony--that when he hired Parley Neeley to survey the property Cummings had purchased from Emil and Bernice Marcellin, he recalls that Mr. Neeley was given a copy of a deed or a tax notice containing a description of the property. (R. 1509). Cummings asserts that his own testimony on this point is "undisputed", (Appellant's Reply Brief at 11), and demonstrates an absence of malice. It is apparent, however, that the trial court did not believe Cummings' testimony on this point. The trial court was not obligated to believe Cummings' testimony, and substantial evidence supports its decision.¹

In like fashion, Cummings attempts to re-argue the evidence concerning whether Old Ranch Road was moved after the deed to the parties' grantors. It is true that Cummings produced a number of witnesses to rebut evidence that Old Ranch Road had been re-aligned by the WPA in the early 1930's. However, the trial court chose to believe the testimony of Frank Marcellin, a neutral witness who grew up on the property and actually saw the WPA crews move the road. The district court was under no obligation to find Cummings' witnesses more credible nor to give greater weight to the evidence Cummings introduced:

¹ See, Appellees' Brief, pp. 19-21.

When acting as the fact-finder, the trial court is entitled to assess the witnesses and to weigh the evidence and draw reasonable inferences therefrom.

Homer v. Smith, 866 P.2d 622, 626 (Utah Ct. App. 1993), cert. denied, 878 P.2d 1154 (1994). Due regard must be given to the trial court's opportunity to observe and judge the credibility of the witnesses, Englert v. Zane, 848 P.2d 165, 168 (Utah Ct. App. 1993), and it is free to disbelieve their testimony. State v. Garrett, 849 P.2d 578, 582 (Utah Ct. App.), cert. denied, 860 P.2d 943 (Utah 1993).

A disagreement with how the trial court weighed certain evidence against other evidence is not a showing that the decision which was reached was "clearly erroneous", unless the decision "is against the great weight of evidence or if the court is otherwise definitely and firmly convinced that a mistake has been made." Bountiful, 784 P.2d at 1175. That cannot be the case here, where substantial evidence supports the trial court's decision to quiet title in the Gillmors and to award them damages for slander of title.

POINT III

THE TRIAL COURT ERRED IN AWARDING THE GILLMORS ONLY HALF THEIR DEMONSTRATED DAMAGES.

Cummings' response to the Gillmors' cross-appeal concerning the district court's award of damages contends that no damages should have been awarded in the first place because Cummings denies that "malice" was proven at trial. However, as discussed in Point II, above, Cummings has failed to show "clear error" concerning the elements of slander of title.

In Point V of his Reply Brief, Cummings argues that even if this Court affirms the finding of malice,

. . . then other elements of the cases [sic] should be reviewed:

1. Gillmors had three sets of attorneys on the cases at various times. [sic]
2. An appeal from a Summary Judgment which was awarded to the other defendant in which Cummings did not take an active role in.
3. An off-set to the amount already received by the Gillmors in excess of the fair market value of the property in dispute should be applied towards attorney's fees award.

(Appellants' Reply Brief, at 16).

While it is correct that the Gillmors' present counsel is their third in the case, Cummings introduced no evidence that this multiplied the attorneys' fees they necessarily incurred. Mr. Athay testified that extra work necessitated by a change of counsel was "at most three hours." (R. 1939).

As to the prior appeal, Cummings' assertion is correct. However, that intermediate appeal was taken by parties to whom Cummings had sold portions of the subject property, or their successors.² Those parties would not have had an interest in the subject property in the first place -- and the Gillmors would not have had to sue them -- if Cummings had not sold property which did not belong to him in the first place. For Cummings to now say

² Those defendants have since settled with the Gillmors and are no longer parties to this action.

that he has nothing to do with the fees of litigating with the other defendants in this case is disingenuous.

Cummings has not challenged the basic thrust of the Gillmors' cross-appeal, that the district court arbitrarily and without reliance on evidence in the record, reduced the attorneys' fees awarded the Gillmors as a result of being required to bring this action to vindicate their ownership of the subject property. For the district court to have done so, it must rely on evidence and articulate its reasoning. It did neither, and the judgment should be reversed in this respect.

CONCLUSION


Cummings has failed to marshal the evidence. Substantial evidence supports the trial court's findings to which Cummings addresses his appeal. Those findings should be affirmed.

The trial court improperly halved the Gillmors' damages in the form of attorneys' fees. No evidence supports this ruling, which this Court should reverse.

RESPECTFULLY SUBMITTED this 8th day of March, 1995.

PARSONS, DAVIES, KINGHORN & PETERS



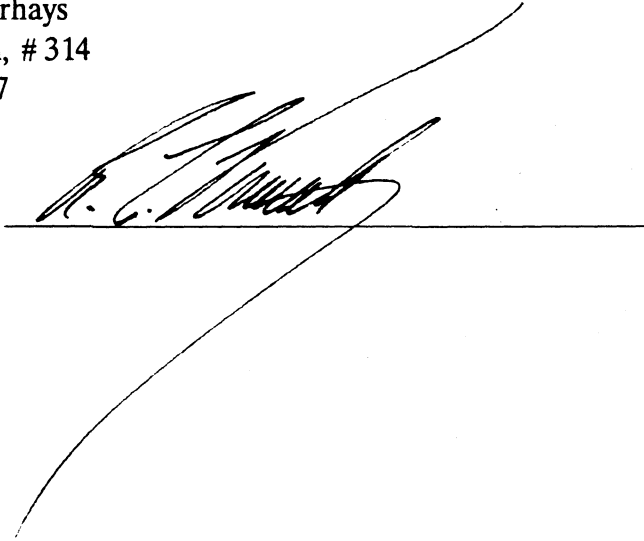
GERALD H. KINGHORN

R. L. KNUTH
Attorneys for Appellees
and Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that two correct copies of the foregoing REPLY BRIEF OF APPELLEES AND CROSS-APPELLANTS were mailed, postage prepaid, on the 8th day of March, 1995, to the following:

Lowell V. Summerhays,
Attorney at Law
Adamson & Summerhays
488 East 6400 South, # 314
Murray, Utah 84107



rik/pldgs/replybrief.gillmor